

Labour Party Call for Evidence on the UK Freedom of Information Act 2000

Dr Ben Worthy

Birkbeck College, University of London

Email: b.worthy@bbk.ac.uk

1. What have been the strengths and weaknesses of the Act and the way in which it is currently working? Specific examples pertaining to you or your organisation may be provided.*

1.1 Our [research found](#) that, in terms of strengths, FOI has **made British government more transparent and more accountable**. FOI's very unpredictability may be a powerful force for by changing behaviour. Its **deeper impact on democracy is less clear**. This is not because FOI has failed but simply because changing levels of, for example, participation and public trust are complex- FOI alone is unlikely to make a difference. FOI can be best seen as part of a wider political ecosystem of formal and informal mechanisms designed to scrutinise government.

1.2 Like all FOI regimes, it has suffered delay, uncertainty and unexpected effects. There is less evidence for any of the **weaknesses claimed by politicians**. Our work concluded that FOI has not had any significant impact on the decision-making process or some of the key constitutional conventions. It does not appear to have led to a **chilling effect**.

To understand how FOI works, it is necessary to remember:

1.3 **FOI is dynamic**, and changes over time depending on use, legal rulings and political reforms. It is a constantly changing law that inevitably **generates uncertainty**.

1.4 **The benefits of FOI may be local and hidden**. Use is heavily orientated towards local government, with nearly four in every five made to local councils. Most FOI requests are **'micro-political'**, seeking factual information and generally involve matters of private interest, focusing on specialised local or personal issues—waste, street fixing, tax and permits—that don't attract attention.

1.5 **It is about perceptions as well as reality**. Understanding how FOI works is not just about what is happening, in terms of statistics or law, but what people claim is happening-so is shaped by perceptions of politicians and the headlines it generates.

2. Whether Act provides a sensible balance between transparency and "safe space" for the internal deliberations of public bodies. Specific examples may be provided.*

2.1 **There is currently a sensible balance**. [As I pointed out to the Commission](#), looking at the section 35 and 36 exemptions, there remains, and may always be, uncertainty. However, the Commissioner and Tribunal have sought to protect 'safe space', dependent on the time period and sensitivity of the information.

2.2 **FOI has not caused a 'chilling effect' on frank advice and deliberation, or on the**

quality of government records. The myth persists, but convincing evidence proved hard to find. Our [own studies](#) across central and local government between 2008 and 2011 were able to discover only a few clear examples, which were minor and isolated. There was no systematic or large scale changes to either minutes or free and frank discussion as a result of FOI. Our and other work FOI can also have a positive effect, professionalising records as a ‘disciplining’ rather than a ‘chilling’ effect.

3. Whether there are any areas in the Act that could be improved, for instance, extending the Act to some private organisations or businesses in receipt of public money or carrying out public functions. Specific examples may be provided.*

3.1 Although it remains a [‘complex’ legal grey area](#), section 5 allows government to extend the law to cover companies within the scope of the Act. This change has been previously discussed at length in the UK between 2007 and 2009 and under the separate Scottish FOI Act on two occasions—resulting in limited extension to leisure trusts in 2012 with possible further coverage of housing associations and private prisons mooted for 2015-2016.

3.2 The Coalition and now the new Conservative government took a different approach of **contractual enforcement**. Rather than extending the Act under section 5, they have championed the use of [new FOI clauses](#) in [public sector contracts](#). It’s not exactly clear how [far this is working](#).

3.3 There has been some gradual natural ‘creeping’ outwards of FOI. [Network Rail](#) became subject to the Act in March 2015 due to a change in accountancy designation. Other new bodies covered since 2005 include exam boards, what was formerly ACPO, free schools (once they are open) and Police and Crime Commissioners (though this report [was ‘deeply’ worried about how transparent they were](#)-see page 11-12). The [Police Federation](#) is now set to follow.

3.4 More significant than this ‘creep’ is the influence of legal decisions from appeal bodies and the courts. A [legal ruling](#) in 2015 *Fish Legal v Information Commissioner and others* over FOI’s sister Environmental Information Regulations appeared to extend the law to water companies-and this may potentially include other utilities too.

3.5 The issue of extension remains a political one. Public sector contracts to private providers are currently worth around £93 billion per year according to the ICO. A UK tracker found 75% of respondents seeing extension [as an ‘important’ issue](#) . [Polling by the Scottish Information Commissioner](#) showed that extension is supported by the public. A full 76% of Scots asked felt private prisons should be covered with 79% believing that housing associations should be as well.

3.6 Any politician pushing for any large scale opening up, such as using section 5, faces three main problems

- First, there may be a potential **reluctance to cooperate or publish** and an enforcement [difficulty in making companies do so](#). Although our study of FOI and local government found that most companies cooperate with FOI requests, any

sceptical business can argue it is (i) unnecessary as so much information is published anyway (ii) a costly burden-see this analysis [here](#).

- Second, added to this may be **the complexity** any change involves, that will take time and energy. The devil, as someone warned of [extractives](#), is in the detail and how it interacts with other systems. So, for example, the UK's push to open up Beneficial Ownership is slightly stymied by the fact that the [EU equivalent will only be partially open](#).
- Third, given these problems there needs to be a lot of **political will, energy and attention** to follow through. Any politician or party pushing large scale openness needs either a very good reason or very strong principles. Most likely it will only happen when there is a very obvious problem to solve or a very obvious political benefit (or both).

3.7 FOI extension is not the only way forward and the Information Commissioner has recently offered [a range of options](#) to fill the 'transparency gap'.

4. How does the cost of operating the Act compare to other types of public expenditure; and should the threshold for refusals on cost grounds by public authorities be raised or not.*

4.1 There is an ongoing debate about how much FOI 'costs', also part of the FOI Commission's investigation. Costs are often discussed within the context of whether the Act is being 'abused' by the media or troublemakers. A number of submissions to the Independent Commission [complained of the resource burden](#). There appears to be some support for a form of charging from [some, but not all, officials](#).

4.2 Measuring the 'cost' of FOI is problematic as it involves balancing administrative resources against democratic benefits. Moreover, the exact cost of FOI is very unclear and any figure, high or low, can be challenged. Methodologically it is almost impossible to obtain a precise figure on the cost of FOI. [Estimates range from an average of £350 to £36 per request](#). The Daily Telegraph calculated FOI [used up 0.0016% of the overall central government budget and 0.018% of local government](#).

4.3 FOI requests become more elaborate but public authorities deal more efficiently with them over time - annual surveys by UCL between 2005 and 2010 found a sharp drop in time taken for organisations to process requests, falling by more than 50% in 5 years.

5. Whether the Act has achieved its objectives and made public authorities more open and accountable. Specific examples may be provided.*

5.1 Our studies of the six objectives of FOI concluded that the core objectives of greater transparency and accountability were achieved.

5.2 FOI has increased transparency. All the evidence showed that the amount of information released has increased across a vast range of subjects from nuclear convoys to Ministerial gifts and from parking fines to councillors' expenses. It has also led to increasingly open cultures within organisations and to the now regular pro-active release of a variety of

information. The exact impact varied as local government was already fairly open and parts of central government less so. Some Whitehall departments still struggle due to senior attitudes or simply the nature of the information they deal with.

5.4 FOI has increased accountability across central and local government and all the way to the police, NHS and Monarchy. It has been used by the media, MPs and campaigners to make government more accountable. Eye catching examples include [the role of FOI in kick starting the 2009 MPs' expenses scandal](#), as part of a wider chain of accountability, and the mass resignation of an [entire parish council in Walberwick](#) in Sussex in 2012. But the extent to which FOI can be used to increase accountability on a more day-to-day level is dependent on whether other actors (the media, NGOs, etc.) are willing and able to make use of it.

5.5 FOI is frequently used alongside other tools of accountability often as part of a process of building a larger picture, or putting together pieces of a jigsaw as in the case of extraordinary rendition or a nationwide campaign against library closures. Below are a selection of high profile or influential requests:

1. **Extraordinary rendition**-the UK's involvement in extraordinary was revealed by FOIs from the All-Party Group on extraordinary rendition.
2. [Details](#) of the **Universal Credit welfare reforms**
3. The **Libor** banking scandal and [knowledge of it](#)
4. Lists of [visitors](#) to the Prime Ministerial residence at **Chequers** (and Ministerial meetings and diaries now [proactively released](#))
5. Creation of the famous '[Weapons of Mass Destruction](#)' dossier
6. The Monarch's [involvement](#) in **vetoing legislation**
7. The results of **local restaurant hygiene inspections**
8. The [planned](#) **closure of local libraries** up and down the country

6. Whether the Ministerial veto has been used appropriately and whether the Supreme Court ruling has undermined that.*

6.1 Before the Supreme Court ruling, the veto worked well, limited by the 'exceptional' nature and political reluctance. Consequently, it was rarely used, especially when compared with other FOI regimes. Any future veto power should be kept as close **as possible to the precise, limited and 'exceptional' model that existed previously.**

Further Reading see:

- Worthy, Ben and Hazell, Robert, (2015) 'Disruptive, Dynamic and Democratic? Ten Years of Freedom of Information in the UK'. *Parliamentary Affairs*, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=2708768>
- Worthy, Ben (2015) 'Evidence to the Independent FOI Commission' <https://opendatastudy.files.wordpress.com/2015/11/foi-commission-submission-2015-ben-worthy.pdf>
- You can read more about my FOI research on my blog <https://opendatastudy.wordpress.com/>